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APR 24

No. 08-801

In the Supreme Court of the United States

YLUMINADA MOJICA AND JULIO ACEVEDO, AS LEGAL REPRESENTATIVES OF JOSHUA ACEVEDO, PETITIONERS

v.

CHARLES E. JOHNSON, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the 36-month deadline for filing petitions under the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-16(a)(2), is subject to equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 287 Fed. Appx. 103. The opinion and order of the United States Court of Federal Claims (Pet. App. 5a-21a) is reported at 79 Fed. Cl. 633. The decision of the special master (Pet. App. 22a-35a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2008. A petition for rehearing was denied on September 26, 2008 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on December 19, 2008. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the National Childhood Vaccine Injury Act of 1986 (Vaccine Act), 42 U.S.C. 300aa-1 *et seq.*, Congress established the National Vaccine Injury Compensation Program to provide compensation from a federal fund for vaccine-related injuries and deaths. 42 U.S.C. 300aa-10 to 300aa-34. A private civil action may not be filed against a vaccine manufacturer or administrator for injuries in excess of $1000 before the claimant has pursued compensation under the Vaccine Act. 42 U.S.C. 300aa-11(a)(2)(A).

To initiate a compensation proceeding, a claimant must file a petition with the United States Court of Federal Claims, and serve the petition on the Secretary of Health and Human Services, within "36 months after the date of the occurrence of the first symptom or manifestation of onset" of the alleged vaccine-related injury. 42 U.S.C. 300aa-16(a)(1) and (2).

2. On June 28, 2004, Joshua Acevedo received a routine diphtheria-tetanus-pertussis vaccination and a routine Prevnar pneumococcal conjugate vaccination. Pet. App. 7a-8a, 24a. That night, he experienced "startling episodes" involving shaking, and he began to run a fever. *Id.* at 8a, 24a (internal quotation marks and citation omitted). The following morning, he experienced additional episodes. *Id.* at 8a. He was taken by ambulance to a hospital, where a pediatric neurologist concluded that Joshua had suffered "encephalitis," either "infectious" or "post[-]vaccine." *Ibid.* (internal quotation marks and citation omitted). By November 2004, Joshua was displaying "increased muscle tone and [some] devel-

opmental delay," such that the neurologist recommended adoption of an "[e]arly [i]ntervention [p]rogram for physical therapy and occupational therapy." *Ibid.* (internal quotation marks and citation omitted).

Petitioners, who are Joshua's parents, later contacted an attorney. Pet. App. 8a. Petitioners' attorney began to prepare a petition for compensation, even though she lacked some of the documents required under 42 U.S.C. 300aa-11(c)(1) and (2) and Vaccine Rule 2(c) of the United States Court of Federal Claims, because the 36-month statute of limitations was due to expire on June 28, 2007. Pet. App. 8a-9a. On June 25, 2007, petitioners' attorney tendered the petition, associated documents, and a filing fee to a private courier service (Federal Express) for overnight delivery to the Clerk of the Court of Federal Claims. *Ibid.* She also served a copy by certified mail on the Secretary of Health and Human Services. *Id.* at 9a. The service copy was delivered to the Secretary on June 28, 2007. Due to apparent mishandling, however, the petition did not arrive at the Court of Federal Claims until July 13, 2007. *Id.* at 9a-10a.*

3. The special master dismissed the petition. Pet. App. 22a-35a. The special master noted that, as petitioners "readily" acknowledged, no petition had been filed prior to the expiration of the statute of limitations

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* Under court rules, a petition "is filed when actually received and marked filed by the clerk, not when mailed." Fed. Cl. R. App. B, Vaccine R. 17(a); see *Widdoss* v. *Secretary of the Dep't of HHS*, 989 F.2d 1170, 1176 n.5 (Fed. Cir.), cert. denied, 510 U.S. 944 (1993). After learning that the first package had not been delivered on time, petitioners' attorney prepared a second petition, which she did not mail until June 29, 2007, a day after the statutory filing deadline. Pet. App. 10a. The second petition arrived at the court on July 3, 2007. *Ibid.*

on June 28, 2007. *Id.* at 30a. The special master explained that, in arguing that the petition should be "deem[ed]" to have been filed by that date, *ibid.*, petitioners "invoke[d] necessarily the doctrine of equitable tolling," *id.* at 32a. The special master concluded that petitioners' argument was foreclosed by *Brice* v. *Secretary of Health & Human Services*, 240 F.3d 1367 (Fed. Cir.), cert. denied, 534 U.S. 1040 (2001), in which the court of appeals held that equitable tolling is not available for claims arising under Section 300aa-16(a)(2). Pet. App. 33a-34a. The special master accordingly concluded that petitioners' action was barred by the statute of limitations. *Id.* at 35a.

4. The Court of Federal Claims affirmed. Pet. App. 5a-21a. The court found that counsel had taken reasonable steps to prepare and entrust the petition "to a reputable third party courier," *id.* at 16a, and noted that the government did not contend that it was prejudiced by the delay, *id.* at 17a. The court concluded, however, that "*Brice*'s holding categorically bars equitable tolling in all cases involving late petitions under the Vaccine Act." *Id.* at 17a (citing *Brice*, 240 F.3d at 1374).

5. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-4a.

ARGUMENT

Petitioners contend (Pet. 5-17) that the Vaccine Act is subject to equitable tolling. This Court has previously declined to review that question, *Brice* v. *Thompson*, 534 U.S. 1040 (2001) (No. 01-341), and there is no reason for a different result in this case.

1. In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and *United States* v. *Brockamp*, 519 U.S. 347 (1997), this Court has explained that statutory limi-

tations periods governing claims against the government are, in general, subject to equitable tolling in the same manner as in private suits, see *Irwin*, 498 U.S. at 95-96, unless there is "good reason to believe that Congress did not want the equitable tolling doctrine to apply," *Brockamp*, 519 U.S. at 350 (emphasis omitted).

In *Brice* v. *Secretary of Health & Human Services*, 240 F.3d 1367 (Fed. Cir.), cert. denied, 534 U.S. 1040 (2001), on which the court of appeals relied in this case (Pet. App. 3a-4a), the Federal Circuit concluded that there is "good reason to find that Congress did not want the equitable tolling doctrine to apply" to claims under the Vaccine Act. 240 F.3d at 1372. First, as the court explained, the Act includes a "specific exception from the limitations period for a petition improperly filed in state or federal court," but contains no exception for equitable tolling. *Id.* at 1373 (citing 42 U.S.C. 300aa-11(a)(2)(B)). Congress's decision to include explicit exceptions to the limitations period suggests that Congress left no room for additional, implied exceptions. *Ibid.*; see *Brockcamp*, 519 U.S. at 351 (citing the explicit exceptions in 26 U.S.C. 6511 in concluding that tax refund suits under that provision are not subject to an additional, implied equitable-tolling exception); *Soriano* v. *United States*, 352 U.S. 270, 273 (1957) (quoting *Kendall* v. *United States*, 107 U.S. 123, 125 (1883)) (a court cannot "superadd" or "engraft" an exception beyond those "enumerated" in the statute). Indeed, just last Term, the Court noted that it had held in *Kendall* that the statute at issue there—which, like the Vaccine Act, provided for suits against the government in the Court of Claims— "was not susceptible to judicial 'engraft[ing]' of unlisted disabilities" warranting tolling. *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 754

(2008) (quoting *Kendall*, 107 U.S. at 125) (brackets in original).

Second, the Federal Circuit in *Brice* explained that "the limitations period is part of a detailed statutory scheme which includes other strict deadlines." 240 F.3d at 1373. In particular, special masters must issue decisions within 240 days of the filing of a petition and may suspend proceedings for no more than a total of 150 days. *Ibid.* (citing 42 U.S.C. 300aa-12(d)(3)(A)(ii) and (C)). As the court explained in *Brice*, those strict time limits reflect Congress's goal of ensuring "quick resolution of claims." 240 F.3d at 1373. To allow equitable tolling would invite "prolonged and wasteful collateral litigation concerning the running of the statute of limitations," which would be "directly inconsistent" with that goal. *Ibid.*

Third, the Federal Circuit in *Brice* noted that the statute of limitations in Vaccine Act cases runs at the time of the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not know then that the vaccine had caused the injury. 240 F.3d at 1373; see 42 U.S.C. 300aa-16(a)(2). As the court of appeals noted, "[i]t would be quite odd for Congress to allow a limitations period to run in cases in which a petitioner has no reason to know that a vaccine recipient has suffered an injury, but to provide for equitable tolling when a petitioner is aware that a vaccine has caused an injury but has delayed in filing suit." *Brice*, 240 F.3d at 1373.

Fourth, under this Court's subsequent decision in *John R. Sand & Gravel*, it is relevant that the Vaccine Act constitutes a waiver of sovereign immunity to bring an action for a money judgment against the federal government in the Court of Federal Claims. That context,

together with the other special features of the Act just described, reinforces that there is good reason to conclude that equitable tolling is not available. See *John R. Sand & Gravel*, 128 S. Ct. at 753, 754; *United States* v. *Dalm*, 494 U.S. 596, 609-610 (1990).

2. Petitioners contend (Pet. 6) that the Federal Circuit's decision in *Brice* reflects a misapplication of the principles articulated in *Brockamp*. Specifically, petitioners contend that the Vaccine Act is distinguishable from the tax-code provision the Court held not to be subject to equitable tolling in *Brockamp* in that the Vaccine Act is "not particularly technical, does not include multiple iterations of the limitations period and does not have the administrative complexity of the tax code." Pet. 6; see *Brockamp*, 519 U.S. at 350-353.

Contrary to petitioners' argument, *Brockamp* neither holds nor suggests that a statute must be deemed to bar equitable tolling *only* if it bears precisely the same characteristics as 26 U.S.C. 6511; it holds that equitable tolling is unavailable if there is "good reason to believe that Congress did not want the equitable tolling doctrine to apply." 519 U.S. at 350 (emphasis omitted); accord *John R. Sand & Gravel*, 128 S. Ct. at 756. As explained above, there are many indications in the Vaccine Act that Congress did not intend to allow implied exceptions to the 36-month limitations period: its decision to provide an explicit exception to the statute of limitations that does not include equitable tolling; its imposition of strict statutory deadlines inconsistent with delay and protracted litigation concerning the applicability of equitable tolling; its decision to specify that the statute of limitations begins to run at the time of the first symptom or manifestation of the onset of injury, even if the petitioner reasonably would not know then that the vac-

cine had caused the injury; and its decision to fashion the Vaccine Act as a waiver of sovereign immunity for suits against the government for a money judgment in the Court of Federal Claims, where tolling has traditionally not applied under the line of cases including *Kendall* and *John R. Sand & Gravel*. Those statutory features constitute "good reason" to conclude that equitable tolling does not apply to Vaccine Act claims.

Petitioners note (Pet. 13-14) that the Vaccine Act's limitations provision provides that "no petition *may* be filed for compensation" after the statute of limitations has run. 42 U.S.C. 300aa-16(a)(2) (emphasis added). But a provision stating that "no petition may be filed" after the limitations period is a categorical *bar* to filing; it cannot be read to mean, as petitioners appear to suggest, that a petition in fact *may* be filed after the limitations period, in certain circumstances. The categorical bar in the statutory text to untimely filings thus does not, as petitioners would have it (Pet. 14), demonstrate that Congress "recognized the need for equitable remedies when appropriate."

Finally, petitioners rely on the "remedial" and "generous" nature of the Vaccine Act. Pet. 6. That reliance is misplaced. The remedial and generous nature of the Vaccine Act in its substantive provisions does not justify ignoring the other factors that show that Congress intended to limit the special statutory scheme to those who file claims within the statutory period, subject to a single exception for claims filed in the wrong court.

Indeed, the special nature of the Vaccine Act program cuts against the availability of equitable tolling. The Act establishes an alternative to traditional tort litigation, affording a means of recovery that is more expeditious and subject to relaxed standards of proof.

But while proceedings under the Vaccine Act are pending, the time for filing a tort action under *state* law is tolled, 42 U.S.C. 300aa-16(c), thereby delaying the resolution of any state-law claims and extending the period of uncertainty for potential defendants in private litigation. That statutory structure furnishes an additional, special reason to conclude that Congress did not also intend for the *federal* limitations period in the Vaccine Act itself to be tolled—with the consequence of still further delay in resolving state-law claims—except in the narrow situation in which the claimant filed in the wrong court, for which Congress explicitly provided in 42 U.S.C. 300aa-11(a)(2)(B).

3. Because the Vaccine Act does not allow equitable tolling, the equitable considerations of petitioners' asserted diligence and the issue of prejudice to the respondent (Pet. 4, 9-13, 16-17) are not relevant to the analysis. The equitable tolling doctrine is, as the court in *Brice* noted, "designed to prevent harsh and unjust results," but it does so at the cost of "invit[ing] prolonged and wasteful collateral litigation." 240 F.3d at 1373. The court of appeals correctly concluded that allowing equitable tolling would be inconsistent with a statutory scheme designed to ensure that claims are settled "quickly and easily." *Ibid.* The Court denied review of that conclusion in *Brice* itself, and review should again be denied in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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